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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BAINBRIDGE ISLAND POLICE)
GUILD, and STEVE CAIN,)

82374-0

No. 82803-2

Respondents,)

v.)

STATEMENT OF GROUNDS FOR
DIRECT REVIEW

THE CITY OF MERCER ISLAND, a)
municipal corporation;)
KIM KOENIG, an individual;)
LAWRENCE KOSS, an individual; and)
ALTHEA PAULSON, an individual,)

Appellants.)

I. Introduction

This action was brought by the Bainbridge Island Police Guild and Officer Steve Cain to prevent the City of Mercer Island from releasing a copy of its internal investigation of Cain to appellants. It is a companion case to *Bainbridge Island Police Guild, et al. v. City of Puyallup, et al.*, Supreme Court No. 82374-0.

STATEMENT OF GROUNDS FOR
DIRECT REVIEW - 1

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1 II. Nature of the Case and Decision

2
3 The City of Puyallup conducted a criminal investigation into the actions of
4 Petitioner¹ Steve Cain, a Bainbridge Island police officer. After the investigation was
5 concluded, the City of Mercer Island conducted an internal investigation into Cain's
6 actions. The Mercer Island file contains the Puyallup investigation.

7 On March 13, 2008, the City of Puyallup received a public records request from
8 Tristan Baurick of the *Kitsap Sun* newspaper requesting a copy of the Puyallup police
9 department criminal investigation records involving Cain. Pursuant to RCW 42.56.540,
10 the City sent notice to Cain indicating that the Puyallup records would be released by April
11 16, 2008, unless a court order enjoining release was served on the City. Cain did not seek
12 or obtain such an order. The City released the requested records to Mr. Baurick. The
13 release of the records resulted in articles about the incident and Cain published in the
14 *Kitsap Sun* newspaper and on the internet.

15
16 The petitioners sought and obtained an injunction against the City of Bainbridge
17 Island from disclosing both the internal and criminal investigation materials generated by
18 the City of Mercer Island and the City of Puyallup.

19 The petitioners then filed an action against the City of Puyallup and respondents
20 Kim Koenig and Lawrence Koss, who had requested copies of the Puyallup criminal
21 investigation. Commissioner Foley of the Pierce County Superior Court refused to grant
22 a temporary order prohibiting release of the records. The City of Puyallup promptly
23 provided the records to respondents Koss and Koenig. Despite the foregoing fact pattern,
24 the Pierce County Superior Court later enjoined the City of Puyallup from producing any
25

26
27 ¹ For clarity, the parties will be referred to as they were in the trial court.

1 of the criminal investigation file relating to Cain to anyone, and ordered the requestors to
2 return the documents previously produced to them by the City of Puyallup. The Pierce
3 County Superior Court's decision is now on appeal in this Court, No. 82374-0.

4 In the instant case, petitioners sought similar injunctive relief precluding the City
5 of Mercer Island from producing its internal investigation records to respondents Koenig,
6 Koss and Paulson. The motion was granted. This appeal followed.

7
8 **III. Issues Presented**

9
10 Four fundamental issues are presented by this appeal:

11 1. Does petitioner Cain have a right to privacy in his name under the Public
12 Records Act, where his name and the Puyallup records (which are included in the Mercer
13 Island records) have already been released without his objection to the media, which
14 publicized his name in relation to the incident in print and on the internet?

15 2. In view of the widespread prior dissemination of Cain's name and his
16 involvement in the incident in the media, have petitioners failed to prove the great injury
17 required for an injunction under RCW 7.40.020?

18 3. Did petitioner Cain waive any privacy interest in his identity by not
19 objecting to the release of the Puyallup records to the *Kitsap Sun* newspaper, after he was
20 given notice and an opportunity to do so?

21 4. Even if Cain's name is deemed private, should the Mercer Island records
22 be released with Cain's name redacted, under the ruling in *Bellevue John Does I-II v.*
23 *Bellevue School District*, 164 Wn.2d 199, 189 P.3d 139 (2008)?

1 IV. Summary of Argument on the Merits

2 A. Petitioner Cain Does Not Have a Right to Privacy in His Name under the
3 Public Records Act, Where His Name and the Puyallup Investigative
4 Records (Contained in the Mercer Island Records) Have Already Been
5 Released, after Notice and Without His Objection, to the Media, Which in
6 Turn Publicized His Name in Relation to the Incident in Print and on the
7 Internet.

8 In this Court's recent decision in the *Bellevue John Does* case, the Court concluded
9 that under the Public Disclosure Act, the names of unidentified public school teachers who
10 were the subjects of unsubstantiated allegations of sexual misconduct were exempt from
11 disclosure. The Court's decision appears to turn on the fact that the identities of the
12 teachers were unknown to the public and to the records requestors and were therefore
13 private. Unlike the anonymous teachers in *Bellevue John Does*, Cain is not an
14 unidentified, unknown subject. He is a named petitioner in this lawsuit. Internet websites
15 and several newspapers, including the *Seattle Post-Intelligencer*, the *Kitsap Sun*, the
16 *Bainbridge Review* and the *Bainbridge Islander*, have reported his name in conjunction
17 with the incident.

18 As noted above, the *Kitsap Sun* newspaper obtained a copy of the Puyallup
19 investigative records pursuant to a Public Disclosure Act request. The City gave notice
20 of the *Sun's* request to Cain. He did not file an objection or seek an injunction against the
21 disclosure. The *Kitsap Sun* and other media outlets then ran articles about the content of
22 the Puyallup investigation, linking Cain's name to the incident. Given this fact pattern,
23 Cain's name is not private for purposes of the Public Disclosure Act.

1 B. In View of the Widespread Dissemination of Cain's Name and His
2 Involvement in the Incident, Petitioners Guild and Cain Failed to Prove the
3 Great Injury Required for an Injunction Under RCW 7.40.020.

4 The record herein demonstrates that Cain's name is in the public domain. The
5 distinction between Cain's name being in the public domain and the anonymous,
6 unidentified teachers in the *Bellevue John Does* case is crucial because in order to get an
7 injunction, one must show great or irreparable injury. See RCW 7.40.020. In the
8 *Bellevue John Does* case, disclosure of the names of the teachers could cause irreparable
9 injury because, absent such disclosure, they remain unidentified. By contrast, Cain's
10 identity and involvement in the incident, as well as the Puyallup records themselves, are
11 already in the public domain. There was no basis for an injunction here because Cain's
12 identity is not private. His identity and involvement in the incident is known to the public.
13 There is no showing by petitioner of great or irreparable injury if the Mercer Island
14 records (which contain the Puyallup records) are released.

15 C. Petitioner Cain Waived Any Privacy Interests in His Identity By Not
16 Objecting to Release of the Puyallup Investigative Records to the Kitsap
17 Sun Newspaper, After He Was Given an Opportunity to Do So.

18 *Columbian Publishing v. City of Vancouver*, 36 Wn. App. 25, 27, 671 P.2d 280
19 (1983), cited in *Bellevue John Does*, supra, 164 Wn.2d at 213, fn.14, 189 P.3d at 146,
20 involved a police guild's vote of "no confidence" in their police chief. After the "no-
21 confidence" vote, the guild issued a news release noting their general concerns about the
22 police chief to the public. In *Columbian Publishing*, the media wanted to view specific
23 complaints the police officers made to the city about their police chief. The court
24 concluded the complaining officers waived any purported right to privacy in their specific
25 complaints by making their general concerns known in their initial media release.
26 *Columbian Publishing*, 36 Wn. App. at 30, 671 P.2d at 283-84. See also *Ames v. City of*
27

1 *Fircrest*, 71 Wn. App. 284, 857 P.2d 1083 (1993). *Ames*, which involved a police chief's
2 defamation suit against a city for release of information to a newspaper, held that even if
3 the "essential to effective law enforcement" PDA exception applied, an agreed-upon press
4 release had already revealed the relevant information. 71 Wn. App. at 296, 857 P.2d at
5 1089. The court noted:

6 Given the facts of this case, Ames [the police chief] could not have
7 remained anonymous even had his name not been disclosed in conjunction
8 with *Fircrest's* disclosure of the balance of the records.

9 ... Furthermore, because Ames's involvement was well known, revealing
10 his name would not hinder future investigations,

11 *Ames, supra*, 71 Wn. App. At 296.

12 Here, as in *Ames*, Cain could not have remained anonymous even had his name not
13 been disclosed in conjunction with the balance of the Puyallup records. As in *Ames*, his
14 involvement in the incident is well known.

15 As noted above, the City of Puyallup gave petitioner Cain notice that the Puyallup
16 records would be released to the *Kitsap Sun* unless a court order enjoining release was
17 served on the City. No such order was received and the Puyallup records were released
18 to the newspaper. That newspaper in turn ran articles in print and on the internet about
19 the Puyallup investigation. Petitioner Cain waived any right to privacy in his name in the
20 Puyallup records by permitting those records to be released directly to the media, with
21 resulting media publicity. *Columbian Publishing v. City of Vancouver*, *supra*, 36 Wn.
22 App. at 30.

1 D. Even If Cain's Name is Deemed Private, the Mercer Island Records Should
2 Be Released With Cain's Name Redacted Under This Court's Ruling in
3 Bellevue John Does 1-11, Supra.

4 This Court's recent decision in *Bellevue John Does 1-11 v. Bellevue School District*
5 *No. 405* (hereinafter "*Bellevue John Does*") supports disclosure of the Mercer Island
6 records to the respondents.

7 The *Bellevue John Does* case decided two issues:

8 (1) This Court concluded that under the Public Disclosure Act, the names of
9 *unidentified* public school teachers who were the subjects of unsubstantiated allegations of
10 sexual misconduct were exempt from disclosure.² *Bellevue John Does*, 164 Wn.2d at 209-
11 210, 189 P.3d at 144. The Court noted that the school districts had already disclosed
12 numerous records documenting the nature of the allegations, types of investigations
13 conducted, and any resulting disciplinary actions. The names of the teachers involved
14 were changed to "John Doe" pseudonyms and other identifying information was removed.
15 The public and the requestors did not know the teachers' identities. *Bellevue John Does*,
16 164 Wn.2d at 208, 189 P.3d at 144, fn.9.

17 In two different sections of its opinion, this Court noted that it is appropriate that
18 the records regarding the investigations of the teachers were disclosed.
19

20 As will subsequently be discussed, *when allegations of sexual*
21 *misconduct are unsubstantiated, the public may have a legitimate concern*
22 *in the nature of the allegation and the response of the school system to the*
23 *allegation.* In this case, the school districts provided the *Times* with
24 "numerous records documenting the nature of the allegation in each case,
25 the grade level, the type of investigation conducted, and any disciplinary
26 action taken. But the names of the teachers were changed to 'John Doe'
27 pseudonyms, and other identifying information was redacted."
28

² Appellants contend that Ms. Koenig's complaint was not "unsubstantiated".

1 *Bellevue John Does*, 164 Wn.2d at 217, 189 P.3d at 149, fn.19, quoting, in part, *Bellevue*
2 *John Does 1-11 v. Bellevue School District No. 405*, 129 Wn. App. 832, at 841, 120 P.3d
3 616 (2005) (emphasis added).

4 This Court then concluded that although the names of the unknown teachers should
5 not be disclosed, the public could continue to access the documents:

6 When an allegation is unsubstantiated, the teacher's identity is not
7 a matter of legitimate public concern. In essence, disclosure of the
8 identities of teachers who are the subject of unsubstantiated allegations
9 'serve[s] no interest other than gossip and sensation.' *Bellevue John Does*,
10 129 Wash. App. at 854, 120 P.3d 616. The public can continue to access
11 documents concerning the nature of the allegations and reports related to
12 the investigation and its outcome, all of which will allow concerned citizens
to oversee the effectiveness of the school districts' responses. The
identities of the accused teachers will simply be redacted to protect their
privacy interests....

13 *Under our holding, the public can access documents related to the*
14 *allegations and investigations (subject to redactions), thus maintaining the*
15 *citizens' ability to inform themselves about school district operations.*

16 *Bellevue John Does*, 164 Wn.2d at 221-222, 189 P.3d at 150-151 (emphasis supplied).

17 The foregoing discussion by this Court makes it clear that its decision turned on
18 the fact that the identities of the teachers were unknown to the public and to the requestors
19 and were therefore private. The Court made it clear that the records themselves, with
20 redaction of the teachers names, should be disclosed to the public.

21 (2) Our analysis is further fortified by this Court's second holding: letters of
22 direction to the teachers were not exempt from disclosure under the Public Disclosure Act
23 but where a letter does not identify substantiated misconduct, the teacher's name and other
24 identifying information must be redacted. *Bellevue John Does*, 164 Wn.2d at 223, 189
25 P.3d at 151.

1 Even if Cain's name were deemed private, *Bellevue John Does* holds that the
2 respondents and the public can access the Mercer Island documents related to the
3 allegations and investigation. 189 P.3d at 150-151.³

4 Based on the foregoing, we respectfully suggest that the trial court erred in
5 ordering non-disclosure of the entire Mercer Island file. *Bellevue John Does* holds that
6 the public can access documents related to the allegations and investigation. 189 P.3d at
7 150-151.

8
9 V. Direct Review Should Be Granted Under RAP 4.2(a)(4).

10 This case involves fundamental and urgent issues of broad public import arising
11 under the Public Records Act. The issues in this case are as compelling as the issues this
12 Court has granted review of in other Public Disclosure Act cases. These issues need
13 authoritative determination by the Supreme Court.
14

15 Undersigned counsel urges this Court to grant direct review in this appeal.

16 DATED this the 9th day of July, 2009.

17 Respectfully submitted,

18 MUENSTER & KOENIG

19 By: S/John R. Muenster

20 John R. Muenster

21 Attorney at Law

22 WSBA No. 6237

23 Of Attorneys for Appellants Kim Koenig and
24 Lawrence Koss

25
26 ³ In the *Bainbridge Island Police Guild v. City of Puyallup* litigation, the City of Puyallup
27 took the position that under *Bellevue John Does*, the City's records should be disclosed with Cain's name
28 redacted.

1 CERTIFICATE OF SERVICE

2
3 I certify that on the date noted below I filed the above entitled document with the
4 Clerk of the Court via e-mail. On the same date, I served the following attorney via
5 email:

6 Robert L. Christie
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10 Daniel P. Mallove
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14 Jeffrey S. Myers
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16 P.O. Box 11880
17 Olympia, WA 98508-1880

18 DATED this the 9th day of July, 2009.

19 MUENSTER & KOENIG

20 By: S/Andi Anderson
21 Andi Anderson
22 Legal Assistant

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STATEMENT OF GROUNDS FOR
DIRECT REVIEW - 10

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Cc: Robert L. Christie; Daniel P. Mallove; Jeffrey S. Myers
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Subject: BIPG, et al. v. City of Mercer Island, et al., No. 82803-2

Ladies and Gentlemen:

Attached please find for filing Statement of Grounds for Direct Review in the above-entitled matter.

Thank you for your attention.

Andi Anderson
Legal Assistant

--

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